

ESTTA Tracking number: **ESTTA309094**

Filing date: **09/30/2009**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92050789
Party	Defendant Hewlett-Packard Development Company, L.P.
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Date	09/30/2009
Attachments	Respondent_Motion_for_Summary_Judgment.pdf ( 15 pages )(202050 bytes ) Decl of Jeffrey Faucette ISO Motion for Summary Judgment.pdf ( 22 pages (743256 bytes )

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Dated: September 30, 2009

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD

NARTRON CORPORATION,

Petitioner,

v.

HEWLETT-PACKARD DEVELOPMENT  
COMPANY, L.P.,

Respondent.

Cancellation No. 92050789

Registration No. 3,600,880

Registration Date: April 7, 2009

Mark: **TOUCHSMART**

Respondent Hewlett-Packard Development  
Company, L.P.'s Motion For Summary  
Judgment

**RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

Respondent Hewlett-Packard Development Company, L.P. ("HP"), by and through its counsel, hereby moves for summary judgment pursuant to Federal Rule of Civil Procedure 56 denying Cancellation Petition No. 92050789 on the ground that there is no likelihood that HP's TOUCHSMART mark will cause confusion, mistake, or deception as to source, sponsorship or affiliation with Petitioner Nartron Corporation's SMART TOUCH mark.

This motion is based on the memorandum in support set forth below, the declaration of Jeffrey E. Faucette and the exhibits attached thereto, as well as the pleadings, documents and records on file in this action and such further written or oral materials, evidence or arguments as may be submitted to the Board prior to or at the hearing on this motion. The undisputed facts and arguments supporting this motion are set forth below.

**MEMORANDUM IN SUPPORT OF RESPONDENT'S  
MOTION FOR SUMMARY JUDGMENT**

**INTRODUCTION**

Nartron contends in its cancellation petition that the marks and goods described in the parties' respective registrations are closely related, and likely to cause confusion among consumers. HP has denied that contention, and has advanced no counterclaims. The petition, accordingly, is appropriately resolved by summary judgment based on the parties' registrations.

As set forth below, the registrations—together with facts of which the Board may take notice—confirm that the marks at issue are dissimilar, and that the claimed goods at issue are substantially different, would typically travel in different channels of trade, and would typically be purchased with a high degree of care. The registrations thus indicate that consumer confusion is highly unlikely, and there is no good cause to examine additional facts that cannot reasonably be expected to alter that conclusion. HP's motion for summary judgment should be granted, and Nartron's cancellation petition denied.

## PROCEDURAL AND FACTUAL BACKGROUND

On May 22, 1991, Nartron filed Application Serial No. 74/168,921 for SMART TOUCH for use in connection with “electronic proximity sensors and switching devices” in Class 9. The SMART TOUCH mark was registered on April 7, 1992 (U.S. Registration No. 1,681,891), with a reported first use in commerce on January 7, 1988. *See* Petition to Cancel, Ex. 1.

On June 4, 2007, HP filed Application Serial No. 77/197,146 for TOUCHSMART for use in connection with “personal computers, computer hardware, computer monitors, computer display screens” in Class 9. The examining attorney did not cite Nartron’s SMART TOUCH mark in his examination of HP’s application. The TOUCHSMART mark was registered on April 7, 2009 (U.S. Registration No. 3,600,880), with a first use in commerce on January 29, 2007. Declaration of Jeffrey E. Faucette in Support of Respondent’s Motion for Summary Judgment (“Faucette Decl.”) Ex. A.

On April 9, 2009, Nartron filed the above-captioned petition to cancel HP’s TOUCHSMART mark, asserting, *inter alia*, that “the mark and goods as described in HP’s registration are so closely related to Petitioner’s mark and goods, [that] confusion and deception as to the origin of Respondent’s goods bearing the mark would occur, all to the damage and detriment of Petitioner.”

On May 19, 2009, the Board entered an order granting HP’s motion for an extension of time to answer with consent. Pursuant to the new trial periods schedule, HP timely answered the petition on June 22, 2009, denying the purported identity of the marks, similarity of goods, and likelihood of consumer confusion. Faucette Decl. ¶3. The parties have exchanged initial disclosures, and discovery is set to close on January 18, 2010.

## ARGUMENT

Federal Rule of Civil Procedure 56 provides for entry of summary judgment when there “is no genuine issue as to any material fact,” and where the moving party is entitled to judgment as a matter of law. The purpose of summary judgment is to avoid an unnecessary trial where additional evidence would not reasonably be expected to change the outcome.

1 *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626, 222 U.S.P.Q. 741, 743 (Fed. Cir.  
2 1984). A dispute over a fact which would not alter the Board's decision will not prevent  
3 entry of summary judgment. *Kellogg Co. v. Pack'em Enters., Inc.*, 951 F.2d 330, 333, 21  
4 U.S.P.Q.2d 1142, 1144-45 (Fed. Cir. 1991). Based on the parties' respective registrations  
5 and other facts subject to judicial notice set forth herein, the Board should grant summary  
6 judgment in favor of HP on the ground that Nartron cannot establish a likelihood of  
7 confusion.

8 **HP IS ENTITLED TO SUMMARY JUDGMENT ON THE GROUND**  
9 **THAT THERE IS NO LIKELIHOOD OF CONFUSION.**

10 Whether a likelihood of confusion exists is a question of law, based on underlying  
11 factual determinations. *Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 767, 25  
12 U.S.P.Q.2d 2027, 2028-29 (Fed. Cir. 1993). Here, only the contents of the two registrations  
13 are at issue, and summary judgment in HP's favor is justified by the absence of a genuine  
14 issue of any *material* fact relating to Nartron's claim of likelihood of confusion under 15  
15 U.S.C. Section 1052(d).

16 The Board determines if there is a likelihood of confusion after considering the  
17 applicable *DuPont* factors. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 1361-62,  
18 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973). A consideration of the relevant *DuPont* factors<sup>1</sup>  
19 reveals that there is no likelihood of confusion here.

20 **A. HP's TOUCHSMART Mark Differs From Nartron's SMART TOUCH**  
21 **Mark in Appearance, Sound, Connotation and Commercial Impression.**

22 The similarity of marks is to be considered with respect to appearance, sound,  
23 connotation and commercial impression. *DuPont*, 476 F.2d at 1361, 177 U.S.P.Q. at 567.

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25 <sup>1</sup>Not all of the *DuPont* factors are relevant here, and HP has only set out the factors  
26 relevant to the Board's consideration of the likelihood of confusion in this case. *See, e.g., In*  
27 *re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 U.S.P.Q.2d 1201, 1204 (Fed. Cir. 2003)  
28 ("Not all of the *DuPont* factors may be relevant or of equal weight in a given case, and 'any  
one of the factors may control a particular case'") (quoting *In re Dixie Rests., Inc.*, 105 F.3d  
1405, 1406-07, 41 U.S.P.Q.2d 1531, 1533 (Fed. Cir. 1997)).

1 To begin with, Nartron’s SMART TOUCH mark and HP’s TOUCHSMART mark differ in  
2 their appearance. SMART TOUCH is a two-word mark consisting of two five-letter words;  
3 TOUCHSMART is a single ten-letter word mark. While they may share the same letters,  
4 the inverse arrangement and the single-word format of HP’s mark renders its appearance  
5 substantially different from that of Nartron’s SMART TOUCH mark. *See, e.g., In re Akzona*  
6 *Inc.*, 219 U.S.P.Q. 94, 95-96 (T.T.A.B. 1983) (SILKY TOUCH and TOUCH O’ SILK  
7 readily distinguishable in appearance); *In re Grow More, Inc.*, No. 78122114, 2005 WL  
8 2543629, at \*2 (T.T.A.B. Sept. 26, 2005) (not precedential) (GROW MORE and MORGRO  
9 marks look different). In short, although they share common elements, the marks do not  
10 look alike.

11 Nor do the marks sound alike. The aural emphasis is on the first term—“SMART”—in  
12 Nartron’s mark and on the first syllable—“TOUCH”—in HP’s mark. *Id.* (“because of the  
13 reversal of the terms comprising the marks, the marks [GROW MORE and MORGRO]  
14 sound different”); *In re Akzona Inc.*, 219 U.S.P.Q. at 95-96 (SILKY TOUCH and TOUCH  
15 O’ SILK readily distinguishable in sound).

16 The marks also diverge in their connotation and consumer impression. While in some  
17 cases a transposition of terms in a mark does little to change the connotation, that is not the  
18 case here, where the reverse sequence in TOUCHSMART emphasizes the term—  
19 “TOUCH”—as a verb and can be understood as an imperative sentence urging the consumer  
20 to touch smart (comparable in that regard to Apple’s former slogan THINK DIFFERENT).  
21 HP’s mark thus assumes a different connotation from Nartron’s adjective-/noun-focused  
22 SMART TOUCH mark. *See, e.g., Murphy, Brill & Sahrer, Inc. v. New Jersey Rubber Co.*,  
23 102 U.S.P.Q. 420, 420 (Comm’r Pats. & Trademarks 1954) (recognizing adjective  
24 connotation for TOPFLITE as used in connection with shoe soles, but locating no meaning  
25 for FLITE TOP as used in connection hosiery except that “it may suggest that there is  
26 something different about the top of the sock or stocking”; “[t]he marks are alike only in that  
27 they are reverse combinations of the same words”); *Marriott-Hot Shoppes, Inc. v. Hedwin*  
28 *Corp.*, 161 U.S.P.Q. 742, 744 (T.T.A.B. 1969) (“‘TABLE TALK’ suggests dinner

1 conversation or the like whereas ‘TALK O’ THE TABLE’ is more or less of a laudatory  
2 term”); *In re Akzona Inc.*, 219 U.S.P.Q. at 96 (SILKY TOUCH conveys impression that  
3 products are silky to the touch; TOUCH O’ SILK suggests that products contain some silk);  
4 *In re Mavest, Inc.*, 130 U.S.P.Q. 40 (T.T.A.B. 1961) (“While ‘SQUIRETOWN’ is a  
5 substantial transposition of the registered mark ‘TOWN SQUIRES,’ it is clear that these  
6 marks create distinctly different commercial impressions”); *McCallum-Legaz Fish Co. v.*  
7 *Frozen Food Forum, Inc.*, 118 U.S.P.Q. 178, 178 (Comm’r Pats. & Trademarks 1958)  
8 (FROSTY SEAS for frozen sea food products has different commercial impression from  
9 SEAFROST for frozen fish: cold sea water vs. white frost crystals).

10 It is well-established that where the common elements in a mark consist of common  
11 words of everyday usage, or where the marks are otherwise non-arbitrary in nature, even  
12 slight differences are enough to render confusion unlikely. *In re Box Solutions Corp.*, 79  
13 U.S.P.Q.2d 1953, 1957-58 (T.T.A.B. 2006) (where definitions confirmed that “box”—the  
14 marks’ common element—is highly suggestive, consumers likely to notice differences  
15 between the marks); *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 1401,  
16 182 U.S.P.Q. 108, 110 (C.C.P.A. 1974) (no likelihood of confusion between KING’S for  
17 candy and MISS KING’s for cakes; confusion unlikely where “the marks are o[f] such  
18 non-arbitrary nature or so widely used that the public easily distinguishes slight differences  
19 in the marks under consideration”); *Colgate-Palmolive Co. v. Carter-Wallace, Inc.*, 432 F.2d  
20 1400, 1401-02, 167 U.S.P.Q. 529, 530 (C.C.P.A. 1970) (common element of marks—  
21 PEAK—“simply a common noun or adjectival word of everyday usage in the English  
22 language” with “laudatory or suggestive indication”; consumers unlikely to confuse PEAK  
23 PERIOD for deodorant with PEAK for dentifrice); *Sure-Fit Prods. Co. v. Saltzson Drapery*  
24 *Co.*, 254 F.2d 158, 160, 117 U.S.P.Q. 295, 297 (C.C.P.A. 1958) (no likelihood of confusion  
25 between SURE-FIT and RITE-FIT despite identical slip-cover products: “Where a party  
26 uses a weak mark, his competitors may come closer to his mark than would be the case with  
27 a strong mark without violating his rights”). Here, the terms “smart” and “touch” are  
28 common words of everyday usage, and their combination does not constitute a highly

1 distinctive mark when used in connection with Nartron's or HP's claimed goods.

2 Indeed, the Board has specifically considered the use of the term "smart" in connection  
3 with technology products, and has recognized its descriptive nature in that context. *See, e.g.,*  
4 *In re Finisar Corp.*, 78 U.S.P.Q.2d 1618, 1621 (T.T.A.B. 2006) (observing that, in  
5 connection with technological devices, the term "smart" consistently "tells the consumer that  
6 the product is highly automated and capable of computing information"), *aff'd*, 223 Fed.  
7 App'x 984 (Fed. Cir. 2007);<sup>2</sup> *In re Cryomedical Scis. Inc.*, 32 U.S.P.Q.2d 1377, 1378  
8 (T.T.A.B. 1994) ("The 'computer' meaning of the term 'smart,' as is the case with many  
9 'computer' words, is making its way into the general language"); *In re Nartron Corp.*, 2000  
10 TTAB LEXIS 566, at \*8 (T.T.A.B. Aug. 21, 2000) (not precedential) (affirming refusal to  
11 register Nartron's SMART VOV mark, concluding that the term "smart" in connection with  
12 the valves at issue "immediately describes, without conjecture or speculation, a significant  
13 characteristic or feature of those goods, namely, that the variable orifice valve has some type

14  
15 <sup>2</sup>In reaching its conclusion, the Board in *In re Finisar Corp.* took judicial notice of  
16 several definitions of the term "smart":

17 In computer technology, a relative term, indicating how sophisticated a  
18 program or machine is and how many capabilities it has. A "smart missile" is one  
19 that is guided electronically, as opposed to a non-hi-tech missile; "smart  
20 modems" have more capabilities and can be programmed to make more decisions  
21 than earlier modems.  
22 www.computeruser.com

23 5.a. Of, relating to, or being a highly automated device, esp. one that  
24 imitates human intelligence.  
25 The American Heritage College Dictionary (3rd ed. 1992)

26 Function: adjective . . . 7.a: being a guided missile <a laser-guided smart  
27 bomb> b: operating by automation <a smart machine tool> c: Intelligent.  
28 Merriam-Webster Online Dictionary, www.m-w.com.

...

24 *Informal*: equipped with, using, or containing electronic control devices, as  
25 computer systems, microprocessors, or missiles: a smart phone; or smart copier.  
26 The Random House Unabridged Dictionary (2d ed. 1993). (78 U.S.P.Q.2d at 1620)

27 *See also* Faucette Decl. Ex. B (Oxford English Dictionary definition of term "smart") at  
28 10(c) ("Of a device: capable of some independent and seemingly intelligent action"; citing  
"smart terminals," "smart traffic signals," "smart transducers," "smart sensors"); 15  
(defining "smart bomb"); 1993 Add. (defining "smart card"); 2007 Draft Add. (defining  
"smart gun" and "smartphone").



1 of computational or logic ability used in operating or controlling the valve”); *Nartron Corp.*  
2 *v. STMicroelectronics Inc.*, 305 F.3d 397, 404, 64 U.S.P.Q.2d 1761, 1765 (6th Cir. 2002)  
3 (affirming determination that Nartron’s SMART POWER mark is generic). The use of  
4 “touch” in the marks, likewise, does not render them arbitrary or distinctive, particularly  
5 given Nartron’s own descriptive use of the term “touch” in its marketing materials. *See, e.g.*,  
6 Faucette Decl. Ex. C (“smart Touch. . . the world at your fingertips”; “*Connecting you with*  
7 *your vehicle...by using intuitive gestures with the Touch of a finger to operate controls*”)  
8 (emphasis in original).

9 Although Nartron was not required to disclaim the terms “smart” or “touch,” the law is  
10 clear that “[t]he absence of a disclaimer does not . . . mean that a word or phrase in a  
11 registration is, or has become, distinctive in the registered mark, so that that part of the mark  
12 must be treated the same as an arbitrary feature.” *In re National Data Corp.*, 753 F.2d 1056,  
13 1059, 224 U.S.P.Q. 749, 751 (Fed. Cir. 1985) (“it is inappropriate to give the presence or  
14 absence of a disclaimer any legal significance”).

15 Given the significant differences between Nartron’s and HP’s marks in a context where  
16 even minor differences are enough to obviate consumer confusion, this factor strongly favors  
17 a finding of no likelihood of confusion.

18 **B. Nartron’s Claimed Goods Are Not Related To HP’s Claimed Goods.**

19 This factor requires examination of the “relatedness of the goods” (*DuPont*, 476 F.2d  
20 at 1361, 177 U.S.P.Q. at 567), and assesses whether the goods at issue can be related in the  
21 mind of the consuming public as to the origin of the goods. The question “must be decided  
22 on the basis of the identification of goods or services set forth in the application, regardless  
23 of what the record may reveal as to the particular nature of applicant’s goods, the particular  
24 channels of trade, or the class of purchasers to which sales of the goods or services are  
25 directed.” *Packard Press Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1359, 56 U.S.P.Q.2d  
26 1351, 1355 (Fed. Cir. 2000).

27 Here, the relationship between the claimed goods in the respective registrations is  
28 remote, and the consuming public is not likely to anticipate any connection in the source of

1 such goods. Nartron’s claimed goods, “electronic proximity sensors and switching devices,”  
2 are electronic components that may be used in products and systems developed for  
3 consumers, but generally are not themselves sold to end consumers. By way of example,  
4 and without confining the scope of Nartron’s claimed goods,<sup>3</sup> Nartron appears to use  
5 proximity sensors and switching devices to develop systems for the automotive industry—  
6 keyless entry systems, touchpad window controls, window sensors, trunk release devices.  
7 *See, e.g.,* Faucette Decl. Ex. C. Proximity sensors and switching devices—in Nartron’s case  
8 *and in general*—are sold to manufacturers and other industry professionals, not to end  
9 consumers.

10 By way of contrast, HP’s claimed goods are well-known consumer electronics  
11 products—“personal computers, computer hardware, computer monitors, and computer  
12 display screens.” Accordingly, the purchaser of a personal computer, computer hardware,  
13 computer monitor or computer display screen is highly unlikely to experience source  
14 confusion with respect to proximity sensors or switching devices. The same is true for the  
15 manufacturers and industry professionals who purchase proximity sensors or switching  
16 devices: they will not associate the source of such products with the source of personal  
17 computers and related computer items.

18 Since the goods are not themselves related, the analysis of this factor turns on whether  
19 “the marks identifying the respective products of [respondent] and [petitioner] would ever be  
20 encountered by the same persons in an environment where a likelihood of confusion could  
21 occur.” *Chase Brass & Copper Co. v. Special Springs, Inc.*, 199 U.S.P.Q. 243, 245  
22 (T.T.A.B. 1978); *see also Reynolds & Reynolds Co., v. I.E. Sys., Inc.*, 5 U.S.P.Q.2d 1749,  
23 1751 (T.T.A.B. 1987) (holding that likelihood of confusion requires “some similarity

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24  
25 <sup>3</sup>Extrinsic evidence can be consulted to remove uncertainty as to the nature of the  
26 goods identified in the application. *In re Continental Graphics Corp.*, 52 U.S.P.Q.2d 1374,  
27 1376-77 (T.T.A.B. 1999); *In re Fesco Inc.*, 219 U.S.P.Q. 437, 439 n.2 (T.T.A.B. 1983)  
28 (“While [brochure describing registrant’s goods] cannot replace or supercede or narrow the  
bounds of registrant’s official recitation of goods, it can lend some meaning and perspective  
to the basic ‘processing equipment and machinery’ terminology of the recitation, and the  
Board has viewed the material in that vein”).

1 between the goods and services at issue . . . beyond the fact that each involves the use of  
2 computers”); *Autac Inc. v. Walco Sys., Inc.*, 195 U.S.P.Q. 11, 16 (T.T.A.B. 1977) (no  
3 likelihood of confusion where, inter alia, manufacturers who buy respondent’s AUTAC  
4 temperature regulators do not buy petitioner’s AUTAC retractile cords except for resale);  
5 *Cognis Corp. v. Hana Co.*, No. 76558733, 2007 WL 683786, at \*9 (T.T.A.B. Feb. 28, 2007)  
6 (not precedential) (“finished toner and ink products obviously intended for home and office  
7 use by businesses and general consumers” not likely be confused with synthetic lubricant  
8 products for industry consumers); *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1244, 73  
9 U.S.P.Q.2d 1350, 1355-56 (Fed. Cir. 2004) (“That two goods are used together . . . does not,  
10 in itself, justify a finding of relatedness. . . . [T]hat finding is part of the underlying factual  
11 inquiry as to whether the goods and services at issue . . . can be related in the mind of the  
12 consuming public as to the origin of the goods”) (internal quotation marks omitted). It is  
13 highly unlikely that the same persons would encounter the respective claimed goods in this  
14 case, much less that they would encounter the goods under circumstances leading to a  
15 mistaken belief that they come from the same source.<sup>4</sup>

16 That was the Board’s conclusion in *In re Unilever Ltd.*, 222 U.S.P.Q. 981 (T.T.A.B.  
17 1984) in comparing CLAX for industrial laundry detergents and CLAK for alkaline cleaner  
18 for food processing plants:

19 Although the marks are nearly identical, and the goods are chemically similar to

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20  
21 <sup>4</sup>Even identical or nearly identical marks have been found unlikely to cause confusion  
22 in light of the different set of prospective consumers to which they cater or the minimal risk  
23 that consumers would link the goods as to origin. *See, e.g., M2 Software, Inc. v. M2*  
24 *Commc’ns, Inc.*, 450 F.3d 1378, 1381, 78 U.S.P.Q.2d 1944, 1946 (Fed. Cir. 2006) (claimed  
25 goods were destined exclusively for the music/entertainment industry, and the  
26 pharmaceutical/ medical industry, respectively; “paramount to this case is the industry-  
27 specific focus of the parties’ claimed goods”); *Shen Mfg. Co.*, 393 F.3d at 1245, 73  
28 U.S.P.Q.2d at 1356 (no likelihood of confusion stemming from use of RITZ for cooking  
classes and for kitchen textiles: “aside from the fact that these goods are used together, there  
is no indication that the consuming public would perceive them as originating from the same  
source”); *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 U.S.P.Q.2d 1156, 1158 (T.T.A.B.  
1990) (no likelihood of confusion between LITTLE PLUMBER for liquid drain opener and  
LITTLE PLUMBER for plumbing-related advertising services); *Quartz Radiation Corp. v.*  
*Comm/Scope Co.*, 1 U.S.P.Q.2d 1668, 1669-70 (T.T.A.B. 1986) (no likelihood of confusion  
between QR for coaxial cable and QR for photocopier components).

1 each other, applicant's industrial laundry detergents and powders and registrant's  
2 alkaline cleaner for food processing plants are not competitive with each other,  
3 nor are they purchased by the same people under circumstances that would give  
4 rise to the mistaken belief that one source was responsible for both products. The  
5 purchasers of industrial laundry preparations are not generally the same  
6 purchasers who buy alkaline cleaners for food processing plants. (*Id.* at 983)

7 Similarly, in *Chase Brass & Copper*, the Board concluded that there was no likelihood  
8 of confusion resulting from the simultaneous use of the identical mark BLUE DOT for  
9 applicant's distributor springs and opposer's brass rod, even though both were used in the  
10 automotive industry:

11 Applicant's distributor springs are a finished product that would be  
12 incorporated into a finished product such as a distributor. On the other hand,  
13 opposer's brass rod is a semi-finished product that would require machining  
14 and/or other processing and would lose its trademark and the identity conveyed  
15 thereby by the time it reached a finished state in products such as nuts, bolts, etc.  
16 There is no evidence in the present case to show that the persons who purchase,  
17 work with, or in any way come in contact with the goods of applicant or opposer  
18 would be the same, thus giving rise to a likelihood of confusion upon seeing the  
19 identical mark upon the respective products. (199 U.S.P.Q. at 245)

20 The Board found no potential for confusion even though applicant's finished products were  
21 sold to end consumers *and* to automotive manufacturers, who also purchased opposer's brass  
22 rod. *Id.* at 245-46.

23 Here, the division between industrial consumers—for sensors and switches—and  
24 individual end consumers—for personal computers and related computer items—is more  
25 rigid, and the possibility of source confusion more remote. After all, the Board is “not  
26 concerned with mere theoretical possibilities of confusion, deception, or mistake or with de  
27 minimis situations but with the practicalities of the commercial world.” *Autac Inc.*, 195  
28 U.S.P.Q. at 16 (citation and internal quotation marks omitted).

The dissimilarity of the claimed goods supports summary judgment in HP's favor in  
this case. Coupled with the difference in appearance, sound and connotation between  
Nartron's and HP's marks, the evidence against a likelihood of confusion substantially  
outweighs any contrary inference that Nartron could offer under any of the remaining  
*DuPont* factors.

**C. Nartron’s Trade Channels Are Different From HP’s Trade Channels.**

The absence of express limitations in the identification of goods by Nartron and HP creates the presumption that the claimed goods move through all reasonable trade channels for such goods, but the reasonable trade channels for “electronic proximity sensors and switching devices” are not comparable to the reasonable trade channels for “personal computers, computer hardware, computer monitors, computer display screens.” The former, for example, are not expected to be sold in retail stores but instead through industry-specific channels—tradeshows, catalogs or directly negotiated wholesale agreements. The latter, by contrast, are typically purchased in retail stores—brick and mortar or Internet. *See, e.g., Cognis Corp.*, 2007 WL 683786, at \*9 (citing “fundamental dissimilarity” in trade channels and customers between finished toner and ink products “obviously intended for home and office use by businesses and general consumers” and synthetic lubricant products for industry consumers). This factor further supports a determination that there is no likelihood of confusion.

**D. Consumers of Nartron’s and HP’s Claimed Goods are Sophisticated.**

As a general matter, neither Nartron’s nor HP’s claimed goods are purchased casually. As discussed above, “electronic proximity sensors and switching devices” are typically sold to industry consumers—sophisticated purchasers who tend to engage in long-term negotiations and direct communications with a vendor. *See, e.g.,* 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* §23:101 (4th ed. 2009) (“*McCarthy on Trademarks*”); *Continental Plastic Containers v. Owens Brockway Plastic Prods., Inc.*, 141 F.3d 1073, 1080-81, 46 U.S.P.Q.2d 1277, 1282 (Fed. Cir. 1998); *Chase Brass & Copper*, 199 U.S.P.Q. at 245 (automotive industry professionals encountering goods at issue likely “personnel highly skilled and knowledgeable in a particular phase of a manufacturing process and well acquainted with various products and trademarks that they would encounter in the particular field of production for which they are responsible”); *Clayton Mark & Co. v. Westinghouse Elec. Corp.*, 356 F.2d 943, 944, 148 U.S.P.Q. 672, 673 (C.C.P.A. 1966) (purchase of high end industrial circuit breakers done “on a very discriminating basis”);

1 *General Controls Co. v. HI-G, Inc.*, 212 F. Supp. 152, 158, 136 U.S.P.Q. 570, 575 (D. Conn.  
2 1962) (lack of likelihood of confusion “emphasized by the fact that most of the defendant’s  
3 products are sold to manufacturers for incorporation into complicated machines. . . . It  
4 would labor the obvious to explain that no one but a ‘sophisticated’ buyer would ever  
5 purchase a miniature relay”).

6 HP’s claimed goods—personal computers and related computer products—are  
7 expensive items subject to careful consideration prior to purchase. *See, e.g.*, 4 *McCarthy on*  
8 *Trademarks* §§23:96-97. The degree of care that consumers would typically exercise in the  
9 purchase of a personal computer and the specialized class of consumer that would typically  
10 purchase proximity sensors and switching devices, further diminishes any likelihood of  
11 confusion arising from the simultaneous use of HP’s TOUCHSMART mark and Nartron’s  
12 SMART TOUCH mark.

13 **E. Nartron’s SMART TOUCH Mark is Not Arbitrary or Distinctive.**

14 As discussed in Section A, above, SMART TOUCH is not arbitrary or distinctive in  
15 the context of Nartron’s claimed goods. Accordingly, it is entitled at most to a narrow scope  
16 of protection, further tipping the likelihood of confusion balance in HP’s favor. *Giersch v.*  
17 *Scripps Networks, Inc.*, 90 U.S.P.Q.2d 1020, 1025-26 (T.T.A.B. 2009) (petitioner’s  
18 DESIGNED2SELL mark deemed highly suggestive, “‘weak’ and entitled to only a limited  
19 scope of protection”; weakness of mark weighs against finding a likelihood of confusion); *In*  
20 *re Dayco Prods-Eaglemotive, Inc.*, 9 U.S.P.Q.2d 1910, 1911 (T.T.A.B. 1988) (finding that  
21 IMPERIAL mark is weak and laudatory and should be afforded a restricted scope of  
22 protection).

1 **CONCLUSION**

2 For all of the foregoing reasons, the Board should grant HP's motion for summary  
3 judgment and deny Nartron's petition to cancel the TOUCHSMART mark.  
4

5 DATED: September 30, 2009.

6 HOWARD RICE NEMEROVSKI CANADY  
7 FALK & RABKIN  
8 A Professional Corporation

9 By: 

JEFFREY E. FAUCETTE

10 Attorneys for Respondent HEWLETT-PACKARD  
11 DEVELOPMENT COMPANY, L.P.  
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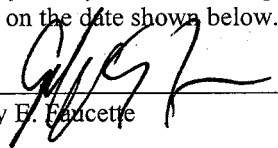
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CANC. NO. 92050789



1 I hereby certify that this correspondence is being deposited electronically with the Trademark Trial and Appeal  
2 Board on the date shown below.

3   
Jeffrey E. Faucette

Dated: September 30, 2009

4  
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10 Attorneys for Respondent  
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COMPANY, L.P.

12  
13 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
14 TRADEMARK TRIAL AND APPEAL BOARD

15  
16 NARTRON CORPORATION,

17 Petitioner,

18 v.

19 HEWLETT-PACKARD DEVELOPMENT  
20 COMPANY, L.P.,

21 Respondent.

Cancellation No. 92050789

Registration No. 3,600,880

Registration Date: April 7, 2009

Mark: **TOUCHSMART**

Declaration Of Jeffrey E. Faucette In  
Support Of Respondent Hewlett-Packard  
Development Company, L.P.'s Motion For  
Summary Judgment

HOWARD  
RICE  
NEMEROVSKI  
CANADY  
FALK  
& RABKIN  
A Professional Corporation

1 I, Jeffrey E. Faucette, declare as follows:

2 1. I am an attorney at Howard, Rice, Nemerovski, Canady, Falk & Rabkin, A  
3 Professional Corporation, counsel of record for Respondent Hewlett-Packard Development  
4 Company, L.P. ("HP"). I make this declaration in support of HP's Motion for Summary  
5 Judgment. Except where otherwise indicated, this declaration is based upon my own  
6 personal knowledge, and I could and would testify competently to the truth of the matters  
7 stated herein if called upon to do so.

8 2. Attached hereto as Exhibit A is a true and correct certified status and title copy of  
9 United States Registration No. 3,600,880 (HP's TOUCH SMART mark).

10 3. On or about May 19, 2009, on HP's behalf, I filed a motion for a 30-day  
11 extension of time to answer Nartron's petition. The Board extended HP's time to answer the  
12 petition to June 22, 2009, and I filed HP's answer on that date. Pursuant to the Board's May  
13 19, 2009 order, discovery is set to close on January 18, 2010.

14 4. Attached hereto as Exhibit B is a true and correct copy of the Oxford English  
15 Dictionary definition of the term "smart," including the text of the Second Edition (1989),  
16 1993 Additions thereto, and December 2007 Draft Additions thereto, that I had downloaded  
17 from the OED Online website (<http://dictionary.oed.com>) on or about September 25, 2009.

18 5. Attached hereto as Exhibit C is a true and correct copy of marketing materials  
19 describing "Key features of Smart Touch technology" that I had downloaded from Nartron's  
20 website (<http://www.nartron.com/?p=pdfviewer&file=host/nartron/File/SmartTouch.pdf>) on  
21 or about September 25, 2009.

22 I declare under penalty of perjury under the laws of the United States of America that  
23 the foregoing is true and correct to the best of my knowledge. Executed this 30th day of  
24 September 2009, at San Francisco, California.

25  
26   
27 JEFFREY E. FAUCETTE  
28

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Date of Deposit and eFiling with the TTAB: September 30, 2009

Robert C.J. Tuttle  
Hope V. Shovein  
Brooks Kushman P.C.  
1000 Town Center, 22nd Floor  
Southfield, MI 48075

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration is executed in San Francisco, California, this 30th day of September, 2009.

By: Georgie M. Price  
Georgie M. Price

HOWARD  
RICE  
NEMEROVSKI  
CANADY  
FALK  
& RABKIN

# **EXHIBIT A**

Declaration Of Jeffrey E. Faucette In Support Of Respondent Hewlett-Packard  
Development Company, L.P.'s Motion For Summary Judgment

7201326



# THE UNITED STATES OF AMERICA

**TO ALL TO WHOM THESE PRESENTS SHALL COME:**

**UNITED STATES DEPARTMENT OF COMMERCE**

**United States Patent and Trademark Office**

**September 04, 2009**

**THE ATTACHED U.S. TRADEMARK REGISTRATION 3,600,880 IS  
CERTIFIED TO BE A TRUE COPY OF THE REGISTRATION ISSUED BY  
THE UNITED STATES PATENT AND TRADEMARK OFFICE WHICH  
REGISTRATION IS IN FULL FORCE AND EFFECT.**

**REGISTERED FOR A TERM OF 10 YEARS FROM *April 07, 2009*  
SAID RECORDS SHOW TITLE TO BE IN: *Registrant***

**By Authority of the**

**Under Secretary of Commerce for Intellectual Property  
and Director of the United States Patent and Trademark Office**

*N. Williams*  
**N. WILLIAMS**

**Certifying Officer**



**Int. Cl.: 9**

**Prior U.S. Cls.: 21, 23, 26, 36 and 38**

**Reg. No. 3,600,880**

**United States Patent and Trademark Office**

**Registered Apr. 7, 2009**

**TRADEMARK  
PRINCIPAL REGISTER**

**TOUCHSMART**

HEWLETT-PACKARD DEVELOPMENT COMPA-  
NY, L.P. (TEXAS LIMITED PARTNERSHIP)  
11445 COMPAQ CENTER DRIVE WEST  
HOUSTON, TX 77070

THE MARK CONSISTS OF STANDARD CHAR-  
ACTERS WITHOUT CLAIM TO ANY PARTICULAR  
FONT, STYLE, SIZE, OR COLOR.

FOR: PERSONAL COMPUTERS, COMPUTER  
HARDWARE, COMPUTER MONITORS, COMPU-  
TER DISPLAY SCREENS, IN CLASS 9 (U.S. CLS. 21,  
23, 26, 36 AND 38).

SER. NO. 77-197,146, FILED 6-4-2007.

FIRST USE 1-29-2007; IN COMMERCE 1-29-2007.

BENJAMIN ALLEN, EXAMINING ATTORNEY

# **EXHIBIT B**

Declaration Of Jeffrey E. Faucette In Support Of Respondent Hewlett-Packard  
Development Company, L.P.'s Motion For Summary Judgment

Entry printed from *Oxford English Dictionary Online*

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smart, *a.*

SECOND EDITION 1989

(smært) Forms: 1-2 **smeart**, 3 **smært**, 3-5 **smerte** (5 **smyrte**), 4-5 **smert** (5 **-tt**); 3- **smart** (4 **-tt**), 4-6 **smarte**. [OE. *smeart*, related to *smeortan* [SMART](#) *v.* Not represented in the cognate languages.]

**I. †1. a.** Of a whip, rod, etc.: Inflicting or causing pain; sharp, biting, stinging. *Obs.*

**a1023** [WULFSTAN](#) *Hom.* (1883) 295 Ic wylle swingan eow mid þam smeartestum swipum. **a1175** *Cott. Hom.* 243 þu ahst to habben..Stede and twei sporen and ane smearte 3erd. **a1300** *Cursor M.* 15785 Wit maces and wit neues smert vn-rekenli on him [they] ran. **c1325** *Chron. Eng.* 929 He was yschote With an arewe kene ant smert. **c1440** *Pallad. on Husb.* I. 940 The Greek seith eek that if a cloude arise Of bresis smert [L. *locustarum*], men must in house hem hide. **1447** *O. BOKENHAM Seyntys* (Roxb.) 47 Whan he on ye crosse..Heng nakyd fastnyd wyth nayles smerte. **1593** [SHAKES.](#) 2 *Hen.* VI, III. ii. 325 Their softest Touch, as smart as Lizards stings. **1671** *J. FLAVEL Fount. Life* xvi. (1836) 143 Sometimes he spares their outward, and afflicts their inner man, which is a much smarter rod.

**†b.** Sharp or rough to the touch. *Obs.*

**c1400** *Destr. Troy* 924 þis stone.., Be it smethe owþer smert, smaragden hit hat.

**†c.** Severe or hard *on* or *upon* one. *Obs.*

**1549-62** [STERNHOLD & H.](#) *Ps.* xxxii. 4 Thy hand on me so grievous was and smart. **1648** *BP. HALL Breathings Devout Soul* (1851) 164 When thy hand hath been smart and heavy upon me.

**2.** Of blows, strokes, etc.: Sufficiently hard or severe to cause pain. (In later use approximating to sense 5.) Also in fig. contexts.

**c1200** *Trin. Coll. Hom.* 207 þenne me hine pinned mid..smerte smiten of



smale longe 3erden. **c1205** LAY. 21364 [They] uppen Colgrime smiten mid swiðe smærte biten. **a1300** *Cursor M.* 25543 Iesu..Sufferd..Dintes sare and smert. **13..** *Sir Beues* 2883 Beues þanne wiþ strokes smerte Smot þe dragoun to þe herte. **c1400** *Rule St. Benet* 22 Yef any be tane ofte in faute,..wyd smerte beting sal sho be chastyd. **c1435** *Torr. Portugal* 2572 Smert boffettes they yeldyd there. **1602** *SHAKES. Ham.* III. i. 50 How smart a lash that speech doth giue my Conscience? **1658** *SIR T. BROWNE Hydriot.* iv. (1736) 45 The smartest Strokes of Affliction leave but short Smart upon us. **1764** *REID Inquiry* v. §6 Suppose him first to be pricked with a pin—this will, no doubt, give a smart sensation. **1841** *LANE Arab. Nts.* (Rtldg.) 12 Take a good-sized stick, and give her a smart thrashing. **1859** *GEO. ELIOT A. Bede* xxx, When a man's got his limbs whole, he can bear a smart cut or two.

†3. Of pain, sorrow, wounds, etc.: Sharp, keen, painful, severe. *Obs.*

**a1300** *Cursor M.* 58 Wyt chaunce of ded, or chaunce of hert, þat soft began has endyng smart. **c1369** *CHAUCER Dethe Blaunche* 507 Hym thought hys sorwes were so smerte. **c1420** *Chron. Vilod.* 1787 Of goddus Passion..& of his wo & of his woundys hard and smert. **c1485** *Digby Myst.* (1882) IV. 192 The sorow of your harte Makes my passion mor bitter & mor smarte. **1513** *DOUGLAS Æneid* v. xii. 63 The fadir Eneas, smyt with this smart cais. **1678** *Lively Oracles* III. §5. 264 That long train of smart calamities which succeeded his sin. **1688** *BUNYAN Jerus. Sinner Saved* (1886) 64 The gospel..threateneth them with the heaviest and smartest judgments.

4. a. Of words, etc.: Sharp, severe; cutting, acrimonious. Now *rare*.

**a1300** *Cursor M.* 3034 Abraham..thoght þis wordes war to smert. **13..** *Ibid.* 12084 (Gött.), Thoru bolning of his hert, To ioseph spac he wordes ouer smart. **1625-8** tr. *Camden's Hist. Eliz.* III. (1688) 269 A Book which was written..against the Marriage in a smart and stinging Style. **1639** *FULLER Holy War* II. xxiv, He would often give a smart jest, which would make the place both blush and bleed where it lighted. **1726** *SWIFT Gulliver* II. iii, He seldom failed of a smart word or two upon my littleness. **1751** *Narr. H.M.S. 'Wager'* 128 This smart Remonstrance touch'd the Lieutenant to the very Heart. **1825** *Gentl. Mag.* XCV. I. 397 'To start' is to apply a smart word to an idle or forgetful person. **1842** *S. LOVER Handy Andy* xviii, The crowd ceased its noise when the two Squires were seen engaged in exchanging smart words.

†b. Sharp in criticism or comment *upon* one.

**1692** WASHINGTON tr. *Milton's Def. People Eng.* iii. Wks. 1851 VIII. 75 The Lawyer, whoever he be, that you are so smart upon, was not so much out of the way. **1699** BENTLEY *Phal.* 390 He fansied, he was very smart upon me; but as it generally happens with him, he lashes himself.

**5.** Brisk or vigorous; having a certain degree of intensity, force, strength, or quickness: **a.** Of natural forces or processes.

**13..** *K. Alis.* 1184 (Bodl. MS.), To mouþe he sett his Olyfaunt, He bloweþ smert & loude sounes. **c1340** HAMPOLE *Pr. Consc.* 3257 Thai er dungen..With smert stormes als of wynd and rayn. **c1386** CHAUCER *Can. Yeom. Prol. & T.* 215 What sholde I tellen..of the esy fir, and smart also, Which that was maad? **a1400-50** *Alexander* 1309 Quen it was smeten in small with þe smert wazes. **1672** SIR T. BROWNE *Lett. Friend.* xii. 136 Sepulchral fires and smart flames. **1692** RAY *Disc.* II. ii. (1732) 107 A smart and continued Rain. **1711** SWIFT *Jrnl. to Stella* 31 Jan., We are here in as smart a frost for the time as I have seen. **1726** T. SMITH *Jrnl.* (1849) 265 This has been a very smart, close winter. **1800** *Med. Jrnl.* V. 31 They..had a smart fever for three days, and then an eruption. **1808** *Ibid.* XIX. 106 Leaving for him two smart purges of calomel and jalap. **1829** *Chapters Phys. Sci.* 463 It demonstrates its presence both by a sudden flash and a smart report. **1875** *Ure's Dict. Arts* III. 1055 The assistant must look to the oil, and bring it to a smart simmer.

**b.** Of liquor, with reference to its effect on the palate.

**1648** J. BEAUMONT *Psyche* IX. lxxxi, A flood, to which..smart Gall is dropping Myrrh. **1664** POWER *Exp. Philos.* I. 33 Both in the keenest and smartest, as well as in the weakest and most watrish Vineger. **1710** T. FULLER *Pharm. Extemp.* 3 The smarter and staler [ale is], the more it openeth and detergeth. **1760-2** GOLDSM. *Cit. W.* lv. (Globe) 177/1 It will eat best with some smart bottled beer. **1818** KEATS *Lett.* Wks. 1889 III. 166 We have now begun upon whisky,..very smart stuff it is.

**c.** Of encounters, attacks, etc.

**a1700** EVELYN *Diary* 2 July 1685, There was a smart skirmish. **1716** CHURCH *Philip's War* (1865) I. 125 In the Evening they heard a smart firing at a distance from them. **1791** GOUV. MORRIS in *Sparks Life & Writ.* (1832) II. 137 A good smart action would be useful rather than pernicious. **1813** *Sporting Mag.* XLII. 68 Cooper planted a smart hit on his adversary's neck. **1844** H. H. WILSON *Brit. Ind.* II. 51 A smart affair with the enemy took place. **1885** *Manch. Exam.* 21 Mar. 6/2 A smart

passage at arms between his Grace and Lord Bramwell.

**6. a.** Pretty steep. Now *dial.* or *colloq.*

**α1668** R. LASSELS *Voy. Italy* (1698) I. 44, I went up a smart hill called Mount Aurigo. **α1904** in *Eng. Dial. Dict.*

**b.** Sharp, abrupt, clearly outlined. *rare.*

**1753** HOGARTH *Anal. Beauty* xiii. 182 These objects which..come forwardst to the view, must have large, strong, and smart oppositions.

**1784** J. BARRY *Lect. Art* v. (1848) 187 The cast and manner of their several foldings, some more smart and frequently interrupted, others more flowing. **1870** G. M. HOPKINS *Jrnls. & Papers* (1959) 201 The day had been very bright and clear, distances smart.

**7. a.** Considerable (in number, amount, extent, etc.). Chiefly *dial.* and *U.S.*

Bartlett *Dict. Amer.* (1848) 313 gives various quotations, including three for *a smart chance* in the sense of ‘a good deal, a large quantity’, etc.

**1778** S. FOOTE *Devil upon Two Sticks* II. 44 in *Wks.* IV, [Scot loq.] Ah! for the mater of that, it is a praty smart little income. **1839** SIR G. C. LEWIS *Gloss. Heref.* s.v., ‘A smart few’ means a considerable number. **1855** THACKERAY *Newcomes* lxxx, Madame..left a smart legacy to the..children. **1882** *Mrs. Raven's Temptation* I. 276 Hope you will get a smart fee with it.

**b.** So **right smart**; also as *n.*, a good deal. *U.S.*

**1842** J. S. BUCKINGHAM *Slave States of America* II. 327, I asked here, whether the people made much maple-sugar in this neighbourhood; when the gentleman..answered, ‘Yes, they do, I reckon, right smart.’ **1856** MRS. STOWE *Dred* II. xvi. 162, I sold right smart of eggs des yere summer. **1857** OLMSTED *Texas* 301 A ‘right smart chunk of bacon’. **1863** S. L. J. *Life in South* I. vii. 91 We have read right smart of that book. **1879** TOURGEE *Fool's Errand* (1880) 88 Directing the work, and, Yankee-like, ‘doing right smart of it’ himself, as they say here. **1932** W. FAULKNER *Light in August* i. 25 There is a right smart of folks in Jefferson I don't know. **1938** M. K. RAWLINGS *Yearling* vi. 54 ‘Howdy, Mr. Forrester. Proud to see you. How's your health?’ ‘Howdy, sir. I'm right smart tol'able, seein' as how I be near about done for.’ **1949** L. NORDYKE *Cattle*

*Empire* 81 Heard a right smart about you, Pincham.

**II. 8.** Pert, forward, impudent. *Obs. rare exc. pred. in **to be** or **get smart** (U.S.).*

**13..** *K. Alis.* 4160 (Bodl. MS.), Darrie was wel sore anoyede..And seide, ‘of tale þou art smart’. **c1449** *PECOCK Repr.* i. i. 5 In this trowing and holding thei ben so kete and so smert and so wantoun. **1607** *TOPSELL Four-f. Beasts* (1658) 114 The curst, sharp, smart,..implacable and wanton-rowling-eyed Women. **1933** *E. O’NEILL Ah, Wilderness* II. 60 *Tommy...* Uncle Sid's soused again. *Mrs. Miller...* You be quiet! Did I ever! You're getting too smart! **1955** *W. C. GAULT Ring around Rosa* v. 59 Don't get smart, Callahan. **1956** *B. HOLIDAY Lady sings Blues* (1973) i. 4 This time Cousin Ida beat me for being smart with her.

**9. a.** Of persons: Quick, active; prompt.

**a1300** *Cursor M.* 7168 Sampson, þat was selcuth smert, Vte o þair handes son he stert. **c1380** *Sir Ferumb.* 5575 þe Sarzyn, þat was fers & smert, howel oppon þe helm he gert. **a1500** *How good wife taught her daughter* 194 in *Q. Eliz. Acad.* 50 When þi seruantes haue do þer werke, To pay þer hyre loke þou be smerte. **1530** *PALSGR.* 324/2 Smarte, swyfte, soudayn. **1655** *FULLER Ch. Hist.* IV. iii. §1 This year began the smart and active Councel of Basil. **1687** tr. *Sallust* (1692) 96 All the while Catiline, with the most active and smartest of his followers kept still in the head of his Men. **1847** *C. BRONTË J. Eyre* iv, Bessie Lee..was smart in all she did. **1899** *F. T. BULLEN Log of Sea-waif* 342 We were mighty smart getting under way.

**b. transf.** Of things.

**a1325** tr. *Stat. Westm.* 11c. 26 (MS. Rawl. B. 520lf. 20b), þer nis no writ..ware þoru þe plaintiffs habbez smarttere riȝt þane þoru þe writ of nouele disseisine. **1658** *SIR T. BROWNE Hydriot.* Introd., Water hath proved the smartest Grave; which in Forty Days swallowed almost Mankind.

**c.** Healthy, well. *U.S.*

**1788** *J. MAY Jrnl.* 31 Aug. (1873) 116 Didn't feel smart enough to go to meeting. **1832** *J. J. STRANG Diary* 23 Aug. in *M. M. Quaife Kingdom of St. James* (1930) 205 This commenced the sickest day I ever suffered since my remembrance but now (evening) I am again smart for a sick

person. **1956** B. HOLIDAY *Lady sings Blues* (1973) i. 1 By the time she worked her way out of hock in the hospital and took me home to her folks, I was so big and smart I could sit up in a carriage.

**10. a.** Clever, capable, adept; quick at devising, learning, looking after oneself or one's own interests, etc. In later use chiefly *U.S.*

**1628** SIR R. LE GRYS *Barclay's Arg.* 81 For he a smart young man, and of great iudgement,..held vp the Kings side. **1656** USSHER *Ann.* VI. (1658) 525 Being.. loath to engage in fight with Fimbria, who was both a smart fellow, and a Conqueror to boot. **1709** STEELE *Tatler* No. 26 ¶5 [He] is what we most justly call, a Smart Fellow. **1786** M. CUTLER in *Life, Jrnls.*, etc. (1888) I. 189 Those of my subscribers who are smart, able men, I have told shall have an equal chance with other proprietors. **1844** MRS. HOUSTON *Yacht Voy. Texas* II. 215 The Opossum is held in great respect by the Yankees, as a particularly 'smart' animal. **1888** BRYCE *Amer. Commw.* (1890) II. lxxv. 484 In America every smart man is expected to be able to do anything he turns his hand to.

**b.** Marked by special skill or dexterity.

**1895** *Daily News* 17 May 3/7 Chatterton being out to a very smart catch at mid-on.

**c.** Of a device: capable of some independent and seemingly intelligent action. Cf. *smart bomb* in sense 15 below.

**1972** *Proc. IEEE* LX. 1282/1 The term 'smart terminal' is used here to identify an interactive terminal in which part of the processing is accomplished by a small computer or processor contained within the terminal itself. **1977** *Sci. Amer.* Sept. 188/1 When smart traffic signals become ubiquitous and are linked to a control center, the traffic cop at the intersection will become obsolete. **1980** *Economist* 15 Mar. 84/3 Tomorrow's vehicles are likely to have a series of 'smart' transducers attached to the engine, gear-box, brakes, etc, all sending coded messages via a common wire to the dashboard. **1982** *Times* 1 June 15/5 Smart sensors ensure a direct hit on a target.

**11. a.** Clever in talk or argument; capable of making witty remarks; good at repartee.

**1639** MASSINGER *Unnatural Combat* IV. ii, A smart quean! **1695** J. EDWARDS *Perfect. Script.* 514 The younger Vossius is a smart advocate



for the Septuagint. **1727** POPE, etc. *Art of Sinking* 109 It is by virtue of this style that..Tully is as short and smart as Seneca. **1753** J. COLLIER *Art of Torment*. (1811) 194 This, I have been told, is what they call being smart in company. **1778** F. BURNEY *Evelina* lxiv, You're so smart there's no speaking to you. **1895** *19th Cent.* Aug. 324 He is decidedly smarter as an all~round talker.

**b.** Of sayings, etc.: Clever, pointed; witty.

**1656** EARL OF MONMOUTH tr. *Boccalini's Advts. fr. Parnass.* I. lv. (1674) 71 We find some Histories..abounding in smart Politick Precepts. **1673** *S'too him Bayes* 19, I acknowledge this Expression to be nice and smart. **1734** tr. *Rollin's Anc. Hist.* (1827) VI. xv. 2 Cicero, who ascribes this saying to Timæus, declares it a very smart one. **1752** JOHNSON *Rambler* No. 194 ¶11 He mistakes the question, that he may return a smart answer. **1824** DIBDIN *Libr. Comp.* 539 A short, but smart notice of him. **1865** DICKENS *Mut. Fr.* I. x, She has a reputation for giving smart accounts of things. **1874** L. STEPHEN *Hours Libr.* (1892) II. vi. 188 Mandeville..passes off his smart sayings upon the public as serious.

**12. a.** Alert and brisk; esp. combining briskness with neatness or trimness of appearance.

**1602** MARSTON *Ant. & Mel.* III. Wks. 1856 I. 37, I..Strook a faire wench with a smart speaking eye. **1683** WOOD *Life* 9 Sept., The smart lads of the city march'd downe the streets with cudgells in their hands. **1784** COWPER *Task* IV. 648 He hates the field,..And sighs for the smart comrades he has left. **1827** O. W. ROBERTS *Voy. Centr. Amer.* 80 Sufficient [room] for a smart vessel to work in or out. **1865** KINGSLEY *Herew.* v, To a tight smart Viking's son. **1884** *Pall Mall G.* 29 Aug. 1/2 The Egyptian soldier is..smart, clean, and cheap.

**b.** Neatly and trimly dressed.

**1789** MRS. PIOZZI *Journ. France* II. 204 We observed..how the town was become neater, the ordinary people smarter. **1806** BERESFORD *Miseries Hum. Life* II. xxiii, Walking out to dinner, clean and smart. **1848** DICKENS *Dombey* ix, He became a little smarter in his dress. **1888** *Poor Nellie* 127 Adela had noticed how smart he looked.

**c.** Of dress, etc.: Neat and trim; stylish.

(a) **1716** DARRELL *Gentl. Instr.* (ed. 3) III. i. 476 Nothing would please his

Worship, but Smart Shooes, Smart Hats, and Smart Cravats... The truth is he had been bred up with the Groom, and transplanted the Stable-dialect into the Dressing-room. **1754** FIELDING *J. Wild* I. x, A blue plush coat,...a smart sleeve, and a cape. **1823** SCOTT *Quentin D.* ii, The smart blue bonnet..was already recognized as the Scottish head-gear. **1859** W. COLLINS *Q. of Hearts* (1875) 23 The man..had a collection of smart little boots and shoes.

(b) **1823** CT. DE SOLIGNY *Lett. Eng.* II. lxxviii, Looking out on the smart shops, the nicely paved streets. **1851** HAWTHORNE *Twice-t. Tales* I. xvi. 252 There, in a smart chaise, a dashingly dressed gentleman and lady. **1894** SIR J. D. ASTLEY *Fifty Yrs. Life* I. 94 We put up at a very smart hotel.

(c) **1864** D. G. MITCHELL *Sev. Stor.* 3 One of them..is bound in smart red leather. **1888** *Poor Nellie* 8, I will make a cover for them,..a smart one of blue velvet.

**13.** Fashionable, elegant, esp. in a very high degree. (Common in recent use, from c1882.)

The reappearance of the word in this sense was the subject of much comment and criticism in newspapers, etc., from about 1885, and the phrases ***smart people***, ***smart society***, ***the smart set***, etc., have been commonly used as a general designation for the extremely fashionable portion of society (sometimes with implication of being a little ‘fast’).

**1718** *Freethinker* No. 158 A Cluster of smart Men, in tawdry Dresses, with little Rapiers. **1793** A. SEWARD *Lett.* (1811) III. 275 This beach..covered with smart people, and with equipages. **1845** M. J. HIGGINS *Ess.* (1875) 24 They..got my wife invited to several very smart balls. **1881** MALLOCK *Romance 19th Cent.* I. 97, I have seen plenty of smart society. *Ibid.* II. 254 Many smart people were shy of Mrs. Crane. **1885** E. W. HAMILTON *Diary* 20 May (1972) II. 867 Dined at Brook House... This is a house at which one meets the ‘grand set’ as distinct from the ‘smart set’—two totally different sections of the best London Society. **1900** *Smart Set* Apr. 137 The Smart Set of London has for the last ten or fifteen years..been the chief influence of our English playwrights, plays and players. **1937** K. BLIXEN *Out of Africa* I. i. 12 Our Quasi Smart Set of the Colony. **1949** P. HASTINGS *Cases in Court* v. 265 Mrs Barney's family were well-known in Mayfair and both Mrs Barney and the dead man were notorious members of the so-called young ‘smart set’. **1974** P. DICKINSON *Poison Oracle* ii. 66 Dinah [sc. an ape]..had indeed left the slums to join the evolutionary smart set, Man. **1981** V.

GLENDINNING *E. Sitwell* ix. 131 Edith's interest in the intrigues of the smart set was minimal.

**14. Comb., as *smart-looking, -suited, -tongued, -witted*.**

**1601** B. JONSON *Poetaster* IV. v, A good smart-tongued Goddesse. **1770** 'P. PENNYLESS' *Sentimental Lucubrations* ii. 31 A smart-looking waiter came up to me. **a1859** in Bartlett *Dict. Amer.* (ed. 2) s.v., A powerful smart looking chunk of a pony. **1897** *Daily News* 28 Sept. 2/1 That friendly, but smart-witted Power. **1922** JOYCE *Ulysses* 249 James's wax smartsuited freshcheeked models.

**15. Special collocations: *smart bomb***, a powered missile which is guided to its target by an optical system; ***smart money U.S.***, money bet or invested by persons with expert knowledge; *transf.* knowledgeable persons; ***smart mouth U.S. slang***, one who is good at repartee, one who gives cheek; so ***smart-mouth v. trans.*** to be cheeky to, to be witty at the expense of; ***smart-mouthed a.***

**1972** *Guardian* 29 June 4/2 Three out of four [missions] have been using 'smart' bombs. **1975** *N.Y. Times* 8 Sept. 2/4 Since 1973 the Israeli Air Force has been furnished with a variety of 'smart bombs' guided by laser beams of television. **1982** *Sunday Tel.* 9 May 17/5 The American 'smart' bomb, which homes on a laser beam shone on to the target by a spotter aircraft.

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**1926** *Amer. Mercury* Dec. 464/2 In referring to money wagered by persons with good tips or information, the term used is *smart money*. **1930** W. R. BURNETT *Iron Man* I. 5 'Well,' said Regan, 'all the smart money's on the black boy.' **1947** *Sun* (Baltimore) 6 Aug. 10/5 Bookmakers and layoff men are gamblers and many times they add personal wages to 'smart money'. **1977** H. FAST *Immigrants* II. 87 Germany has declared war on Russia, and the smart money says that this is only the beginning. **1981** *Times* 7 Nov. 6/8 Mr Weinberger..is close to the President..much closer than Mr Haig has ever been. In a battle for Mr Reagan's ear, all the smart money would be on Mr Weinberger.

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**1968** *Sun Mag.* (Baltimore) 13 Oct. 19/1, I was a smart mouth, a troublemaker in school. **1976** R. B. PARKER *Promised Land* (1977) xii. 65 Don't smart-mouth me, man. You wisening off at me? **1978** J. L. HENSLEY *Killing in Gold* (1979) viii. 97 He..beat up three kids..when one of them smart-mouthed him.



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**1976** *Publishers Weekly* 19 Apr. 82/3 Smart-mouthed film critic for *Gotham* magazine. **1978** J. IRVING *World according to Garp* xii. 229 Some smart~mouthed motorist..will..ask.., ‘What are you in training for?’

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## ADDITIONS SERIES 1993

**smart**, *a.*

Add: [II.] [15.] **smart card** (also **smartcard**) orig. *U.S.* [cf. [INTELLIGENT](#) *a.* 5], a plastic bank card or similar device with an embedded microprocessor, used in conjunction with an electronic card-reader to authorize or provide particular services, esp. the automatic transfer of funds between bank accounts.

**1980** *N.Y. Times* 14 Dec. III. 4/3 They preferred to write checks, knowing these would not clear until the next pay check had arrived. ‘\*Smart card’ holders could react the same way. **1983** *Electronics* 10 Mar. 52 The Army started to explore the smart card in January 1982 as a complete records-keeping vehicle. **1984** *New Scientist* 8 Mar. 25/2 The most recent, and most adventurous approach to credit cards is the ‘smartcard’, with built in microchip. **1988** *Times* 23 Feb. 30/7 The beauty of the algorithm..is that it can be built into hardware that will fit even on ‘smart cards’, and enables the identity of end-users to be checked in less than a second.

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## DRAFT ADDITIONS DECEMBER 2007

**smart**, *adj.*

► **smart dust** *n.* *Telecommunications* a collection of very small computerized sensors capable of wireless communication, designed to act as a dispersed network.

**1998** V. S. HSU et al. in *Univ. Calif., Berkeley: Electronics Res. Lab. Memo. M98/2 (title)* Wireless communications for \*smart dust. **2000** *N.Y. Times* 31 Dec. IV. 4/3 Clouds of ‘smart dust’—tiny computers and sensors each a cubic millimeter in size—will course through the skies monitoring the weather or the traffic below. **2005** *Electronic Business* (Nexis) 1 Jan. 12 The smart dust networks are built from simple

components, including a low-power radio that stays in contact with the next radio in the chain. Each node, or mote, collects data and passes it on through the network until it reaches a point where the data can be processed. **2006** *Times* (Nexis) 14 Feb. 7 Developed by the US military to give blanket coverage to areas under surveillance, smart-dust sensors could eventually be the size of a pinhead.

► **smart gun** *n.* a (hypothetical) gun incorporating technology that renders it capable of seemingly intelligent action; *spec.* a gun that can be fired only by an authorized user.

**1986** *Los Angeles Times* (Nexis) 13 July 24 Director Cameron had worked hard to create the ‘\*Smart-gun’ that Weaver and others used so frequently. **1993** *CNN News* (transcription of TV programme) (Nexis) 5 June, A so-called smart gun—a firearm that can only be discharged by its owner. **1998** *Guardian* 23 Oct. I. 17/2 Several other companies are pursuing different smart gun technologies, including one that depends on recognising a gun owner's fingerprints, and one that recognises the owner's hand size.

► **smartphone** *n.* any of various telephones enhanced with computer technology; (now) *spec.* a type of mobile phone which incorporates the functions of a palmtop computer, personal digital assistant, or similar device.

**1978** *Business Week* (Nexis) 19 June 92B, ‘Only God knows what the applications could be’ for \*smart phones. **1997** *Computing* 6 Nov. 3/5 It said sales of smart phones—mobile phones loaded with data communications software—will nearly treble next year. **2005** *Men's Health* June 50/4 This multimedia widescreen smartphone..also has handwriting recognition.

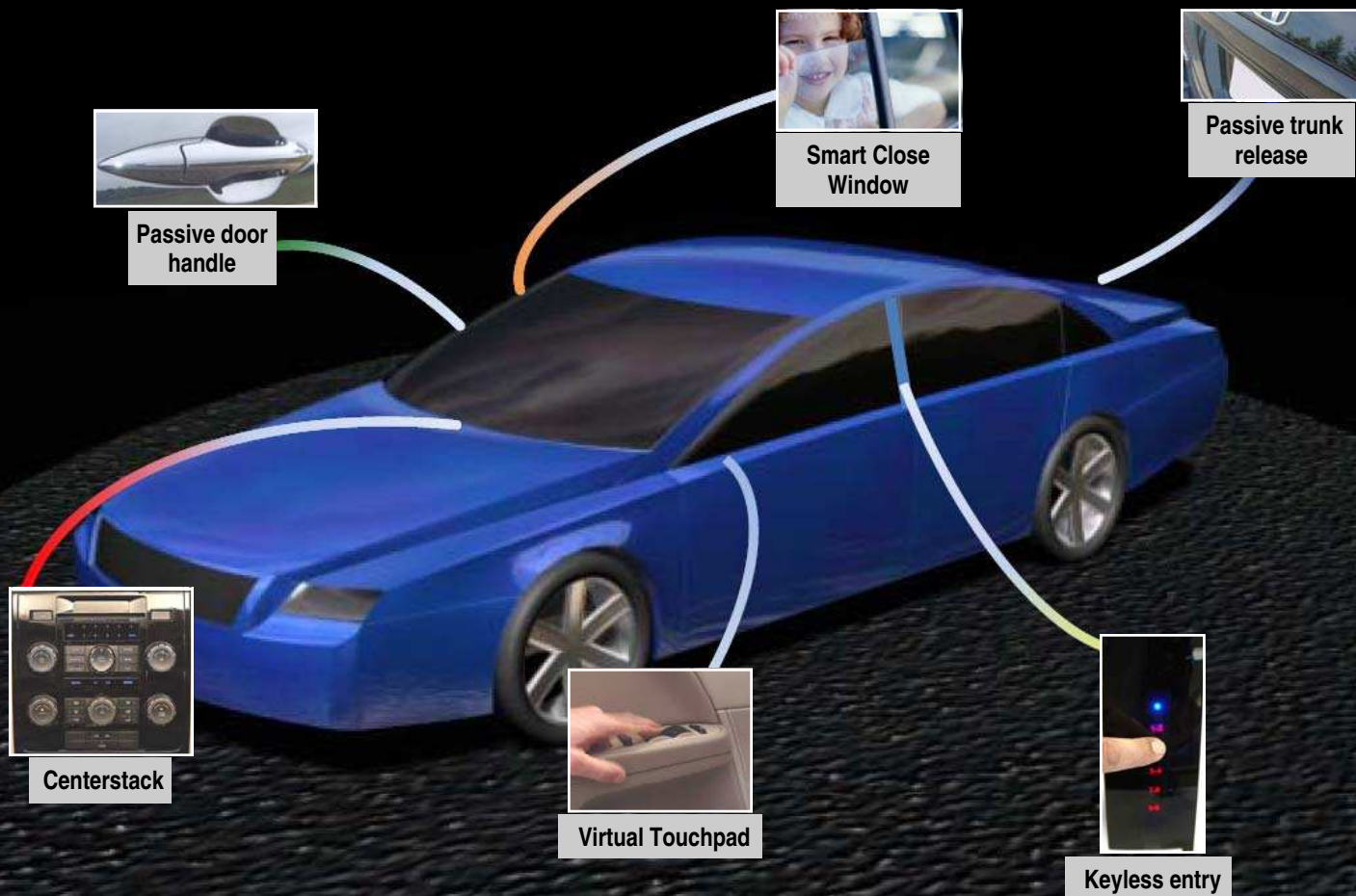
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# **EXHIBIT C**

Declaration Of Jeffrey E. Faucette In Support Of Respondent Hewlett-Packard  
Development Company, L.P.'s Motion For Summary Judgment

**Connecting you with your vehicle...**

by using intuitive gestures with the **Touch** of a finger to operate controls



Smart Touch<sup>®</sup> systems are intuitive, easy-to-use and able to provide a variety of functions while driving. This helps our customers concentrate on the road, while the safety of their passengers is ensured. Our systems can be tailored to fit any customer's specific needs.

### *Key features of Smart Touch technology*

- MPA (multi-point activation; proximity or touch) provides zoom-in and zoom-out interactive displays
- Each sensor can accept multiple finger pinching, spreading, static and direction inputs, touch, hold, slide
- Sensing through multiple materials including gloves, plastics, metallic paint, etc.
- Differentiates various substances such as lotion, water, etc. to only allow intended human touch
- Surfaces may be curved, contoured or flat
- Changing switch appearance does not require retooling

smart**Touch**<sup>®</sup> . . . the world at your fingertips

**NARTRON**  
CORPORATION

**"AMERICA'S TOP 50 INNOVATOR"**

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# Virtual Touchpad™

Smart Touch® sensing.....

A simple touch and sliding motion across a selected window pad controls both opening and closing.\*

## Manual operation:

Slide finger from front to rear (window down) or rear to front (window up) and hold until desired window position is achieved, then release.



## Express operation:

Slide finger from front to rear (express down) or rear to front (express up) and remove finger from touchpad.



**NARTRON**  
CORPORATION



5000 NORTH US-131 · REED CITY, MI 49677  
(231) 832-5525 · www.nartron.com

**Smart Touch<sup>®</sup>**  
Keypad Part No. 1310674

## GENERAL DESCRIPTION

Smart Touch<sup>®</sup> sensing is a breakthrough in human interface technology providing direct access to computer power, such as with highly successful handheld devices. By combining the reliability and flexibility of completely solid state sensing along with “Anthrotronic<sup>™</sup>” considerations, capacitive switching interface technology creates new automotive design opportunities.

Smart Touch<sup>®</sup> enables a person to use fingers to control computer software through a display screen. A key feature of Smart Touch<sup>®</sup> allows for multiple touches simultaneously or sliding fingers across a screen.\* Applications include the automobile IP, radio and HVAC controls.

## FEATURES

- Smart Touch<sup>®</sup> .....
  - 1) unique and patented hardware-software provides under 3 millisecond operations.
  - 2) is a totally solid state design featuring (a) proximity sensing (b) touch implementation inherent within the technology. No moving parts.
  - 3) sense and control through nonconductive covering material such as glass, plastic, wood, etc.
  - 4) may incorporate multiple-input sensing, slewing of touch area, and automatic shutdown or lockout function.
  - 5) can operate on AC or DC. Controls resistive as well as inductive loads. The versatile system can control fluorescent fixtures and electric motors.
  - 6) uniquely lends itself to multiplex systems since its solid-state switching operates at logic levels and can interface directly with electronic controllers.
- High density “keyboarding” allows compact control configurations
- Totally sealed system operation at virtually any humidity level
- Switch function is independent of surface graphics and provides a new level of design freedom since the overlay surface is not part of the switch. Deadfront backlit applications are optional.

**Integrated SENSE – COMPUTE – CONTROL<sup>®</sup> Systems**